

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM M. BLOTZKE,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

No. CV-09-0230-CI

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DIRECTING ENTRY OF
JUDGMENT FOR DEFENDANT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney David Burdett represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

ADMINISTRATIVE PROCEEDINGS

On April 12, 2006, William Blotzke (Plaintiff) filed an application for disability insurance benefits (DIB), alleging an onset date (amended) of January 1, 1999. (Tr. 64.) Plaintiff was eligible for DIB through December 31, 2002. (Tr. 18, 64.) He alleged disability due to post traumatic stress disorder (PTSD), hearing loss and arthritic knees. (Tr. 68.) His application was

1 denied on reconsideration June 19, 2006, well after his DIB insured
2 status had expired. (Tr. 21-22.) Plaintiff did not appeal this
3 decision; therefore, it became administratively final and binding.
4 20 C.F.R. § 404.987(a).

5 On September 14, 2007, Plaintiff protectively filed a second
6 application for DIB, alleging an onset date of April 1, 2006, later
7 amended to January 1, 1999. (Tr. 31, 33, 52.) His application was
8 denied on September 29, 2007. (Tr. 23.) He filed a request for
9 reconsideration on October 26, 2007, which was denied on November
10 20, 2007. (Tr. 28.) On November 20, 2007, Plaintiff requested a
11 hearing before an administrative law judge (Tr. 31-32.) On March
12 18, 2009, Plaintiff's representative requested the 2006 claim be
13 reopened for consideration of alleged "new and material" evidence.
14 (Tr. 38-39, 40-44.) On April 1, 2009, ALJ R.J. Payne found no good
15 cause existed to reopen the 2006 claim; he applied the doctrine of
16 *res judicata* to the 2007 claim and dismissed Plaintiff's request for
17 hearing. (Tr. 18-19.) The Appeals Council denied review, (Tr. 3-
18 4); this appeal followed pursuant to 42 U.S.C. § 405(g).

19 STANDARD OF REVIEW

20 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
21 court set out the standard of review:

22 A district court's order upholding the Commissioner's
23 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
24 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
25 Commissioner may be reversed only if it is not supported
26 by substantial evidence or if it is based on legal error.
27 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
28 Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more

1 than one rational interpretation, the court may not
2 substitute its judgment for that of the Commissioner.
3 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
F.3d 595, 599 (9th Cir. 1999).

4 The ALJ is responsible for determining credibility,
5 resolving conflicts in medical testimony, and resolving
6 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
7 Cir. 1995). The ALJ's determinations of law are reviewed
8 *de novo*, although deference is owed to a reasonable
9 construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

10 **ISSUE**

11 The question is whether the Commissioner's decision is
12 supported by substantial evidence and free of legal error.
13 Plaintiff argues the ALJ erred in applying the doctrine of *res*
14 *judicata* to deny his request for hearing. He claims the ALJ was
15 obligated to reopen his 2006 claim due to his unrepresented status
16 and alleged mental incompetence at the time. (Ct. Rec. 14 at 5; Ct.
17 Rec. 17.)

18 **DISCUSSION**

19 Once a determination by the Social Security Administration
20 becomes final, any future claims involving a claimant's rights on
21 the same facts and issues are subject to the application of *res*
22 *judicata*. 20 C.F.R. 404.957(c)(1); *Social Security Regulation (SSR)*
23 91-5p. A determination becomes final for purposes of *res judicata*
24 when a claimant fails to request review within the time periods
25 provided by the Regulations. SSR 91-5p. "The Commissioner . . . may
26 apply *res judicata* to bar reconsideration of a period with respect
27 to which she has already made a determination, by declining to
28 reopen the prior application." *Lester v. Chater*, 81 F.3d 821, 828
(9th Cir. 1995).

1 **A. Reopening of Plaintiff's 2006 Claim**

2 Under the Regulations, the Social Security Administration may
3 reopen claim within four years of the date of the notice of the
4 initial determination if it finds good cause, as defined in 20
5 C.F.R. § 404.989. 20 C.F.R. §404.988. Good cause exists if: (1)
6 "new and material" evidence is submitted; (2) a clerical error in
7 the computation of benefits is made; (3) or the evidence considered
8 clearly shows that an error was made in the proceedings. 20 C.F.R.
9 § 404.989(a).

10 Plaintiff claims he has submitted new and material evidence
11 that warrants the reopening of his 2006 claim. He also argues that
12 the Commissioner's *Acquiescence Ruling* (AR) 90-4(4) is applicable to
13 his claim because (1) he was unrepresented and (2) he has presented
14 evidence of mental disability. Defendant replies AR 90-4(4) does
15 not apply in the Ninth Circuit, and the allegedly "new and material"
16 evidence submitted is not relevant to Plaintiff's DIB insured status
17 period.¹ (Ct. Rec. 16 at 4-5).

18 **1. Medical Evidence Presented as "New and Material"**

19 Plaintiff submits mental health progress notes, dated April 13,
20 2005 to December 13, 2005, and a May 2, 2006 Rating Decision from
21 the Veterans Administration (VA). (Tr. 6-15.) The new records
22 submitted show Plaintiff attended several mental health counseling
23 sessions in which the VA claims process and Plaintiff's symptoms
24

25 ¹ Under 20 C.F.R. § 404.1505, Plaintiff must establish
26 disability between his alleged onset date, January 1, 1999, and his
27 date of last insured, December 31, 2002. (Tr. 18; Ct. Rec. 13 at
28 3.)

1 were discussed. The counselor noted symptoms of anxiety, alcohol
2 abuse, PTSD, and depression; however, no formal diagnosis by an
3 acceptable medical source is presented. The evidence also shows
4 Plaintiff became entitled to VA unemployment benefits from April 19,
5 2005. (Tr. 13-15.) This evidence does not establish disability, as
6 defined by the Social Security Act, during Plaintiff's DIB insured
7 status period.

8 As found by the ALJ, a comparison of the evidence submitted and
9 the evidence considered in reaching the 2006 determination shows new
10 and material evidence has not been presented. (Tr. 19.) Further,
11 as found by the ALJ, SSR 91-5p (Mental Incapacity and Good Cause for
12 Missing the Deadline to Request Review) does not apply because
13 Plaintiff did not allege or have a mental impairment at the time of
14 the prior determination. (Tr. 18.)

15 In SSR 91-5p, the Commissioner advises that failure to meet
16 deadlines for requesting review is not automatic grounds for
17 dismissing an appeal. "[P]roper consideration will be given to a
18 claimant who presents evidence that mental incapacity may have
19 prevented him or her from understanding the review process." SSR
20 91-5p. Here, the 2005 progress notes submitted do not establish
21 "mental incapacity" at the time of the prior determination.
22 Therefore, the ALJ's finding that under 20 C.F.R. §§ 404.988, .989,
23 and SSR 91-5, reopening is not warranted is reasonable and supported
24 by substantial evidence.

25 **2. Application of AR 90-4(4)**

26 When the Social Security Administration determines a United
27 States Court of Appeals ruling conflicts with its interpretation of
28

1 the Social Security Act, it will issue an AR describing the agency
2 case and the court decision, identify the issues involved and
3 explain how it will "apply the [court's] holding to claims at all
4 levels of the administrative review process within the applicable
5 circuit." 20 C.F.R. 404.985(a)(emphasis added). Plaintiff's claim
6 that AR 90-4(4) should be applied to his case is without merit.

7 The Commissioner issued AR 90-4(4) to resolve a conflict
8 between 20 C.F.R. § 404.988 and the Fourth Circuit's ruling that
9 when a claimant who was not represented at the time of the prior
10 unfavorable determination presents a *prima facie* showing that mental
11 incompetence prevented him or her from understanding the
12 administrative review procedures, the Commissioner cannot refuse to
13 reopen an otherwise final determination without first refuting that
14 showing. See *Culbertson v. Secretary of Health and Human Services*,
15 859 F.2d 319 (4th Cir. 1988).

16 Although AR 90-4(4) arguably expands the conditions for
17 reopening in the Regulations, the Commissioner explicitly directs
18 that AR 90-4(4) applies only in the following states in which the
19 claimant resides: Maryland, North Carolina, South Carolina,
20 Virginia, or West Virginia, *i.e.*, the Fourth Circuit. AR 90-4(4);
21 see also SSR 91-5p (AR 90-4(4) "must be followed when adjudicating
22 such cases arising in the Fourth Circuit."). AR 90-4(4) is not
23 applicable to Social Security cases in the Eastern District of
24 Washington. Therefore, ALJ Payne was correct in applying 20 C.F.R.
25 § 404.988 to this case.

26 **B. Administrative Res Judicata**

27 The Commissioner's June 19, 2006, determination denying
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1 Plaintiff's claim for DIB became final when the time to request
2 review expired and Plaintiff did not seek review. 20 C.F.R. §
3 404.987. ALJ Payne found Plaintiff's 2007 DIB claim was based on
4 the same facts and same issues upon which the 2006 claim was based.
5 This finding is supported by substantial evidence. (Tr. 6-5, 21,
6 83-155.) Because the ALJ's determination that conditions for
7 reopening are not present is supported by substantial evidence and
8 without legal error, he did not err in applying *res judicata* and
9 dismissing the 2007 claim. *Taylor v. Heckler*, 75 F.2d 872, 876 (9th
10 Cir. 1985). Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
13 **DENIED.**

14 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
15 **GRANTED.**

16 The District Court Executive is directed to file this Order and
17 provide a copy to counsel for Plaintiff and Defendant. Judgment
18 shall be entered for Defendant and the file shall be **CLOSED.**

19 DATED August 17, 2010.

20
21 S/ CYNTHIA IMBROGNO
22 UNITED STATES MAGISTRATE JUDGE
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